

No. 10-55946

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

COLUMBIA PICTURES INDUSTRIES, INC., et al.,

Plaintiffs-Appellees,

v.

GARY FUNG and ISOHUNT WEB TECHNOLOGIES, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of California, No. 06-CV-05578
Hon. Stephen V. Wilson, District Judge

**BRIEF OF GOOGLE INC. AS *AMICUS CURIAE* IN SUPPORT OF THE
PETITION FOR PANEL REHEARING**

David H. Kramer
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300

Brian M. Willen
WILSON SONSINI GOODRICH & ROSATI
1301 Avenue of the Americas
40th Floor
New York, NY 10019
(212) 999-5800

Counsel for Amicus Curiae

APRIL 15, 2013

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Google Inc. states that it has no parent corporation and no publicly held corporation has an ownership stake of 10% or more in it.

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INTEREST OF *AMICUS CURIAE*¹

Google Inc. is one of the world's largest and best known online service providers. In many different aspects of its business, and that of its subsidiary YouTube, Google relies on the proper application of the DMCA "safe harbors" that were addressed by the panel in this case. Google thus has an overriding interest in the proper interpretation of the DMCA. Google submits this brief because of its concern that one passage in the panel's opinion may be misread to deprive legitimate online service providers of the DMCA safe harbor in ways that the statute does not support and that Congress could not have intended. That misreading could undermine safe-harbor protection and make it more difficult for Internet companies to offer innovative services to their law-abiding users. Google thus urges the panel to clarify its opinion to confirm that the passage in question was focused on the particular circumstances presented here and would not apply to other cases involving different and less extreme facts.

ARGUMENT

This *amicus* brief focuses on an isolated but potentially significant aspect of the panel's opinion, which addressed whether the finding that the Fung defendants received "a financial benefit directly attributable to" infringing activity that they

¹ Pursuant to Fed. R. App. P. 29(c), *amicus* states that no party or counsel for any party (and no person other than counsel for *amicus*) authored this brief, in part or in whole, or contributed any money that was intended to fund preparing or submitting it. Both parties have consented to the filing of this *amicus* brief.

had the “right and ability to control” under the DMCA erases safe-harbor protection across-the-board for all infringements that might have occurred on their services. This is what the panel wrote:

We have no difficulty concluding that where the § 512(c)(1)(B) safe harbor requirements are not met, the service provider loses protection with regard to any infringing activity using the service.

* * *

We therefore hold that because Fung does not meet the requirements of § 512(c)(1)(B), he is outside of the § 512(c) safe harbor with respect to all infringement activity on the sites that are the subject of this suit.

Columbia Pictures Indus. v. Fung, No. 10-55946, slip op. at 52-53 (9th Cir. Mar. 21, 2013). While that result may have been appropriate on the facts of this case, its possible application to other cases is worrying and occasions this brief.

There is a danger that this passage could be misconstrued to stand for a broader proposition that we do not believe the panel intended: that any time an online service provider is found to have exercised “substantial influence” over *any* user-submitted content on its service—no matter what that finding was based on—it thereby loses its DMCA safe harbor protections for *all* user-submitted content on the entire service. This is how some copyright plaintiffs have already tried to read the panel’s ruling. In a recent submission to the Southern District of New York in the *Viacom v. YouTube* case, for example, the plaintiffs have asserted, citing the panel opinion, that this Court “made clear that where DMCA eligibility is

unavailable due to the right and ability to control prong of the safe harbor, the DMCA defense is broadly lost as to all clips in suit.” Ltr. from Paul M. Smith to Hon. Louis L. Stanton at 2 (March 22, 2013) (attached as Ex. 1).

Google does not believe that this sweeping interpretation of the panel opinion is correct; indeed, such a misreading could lead to absurd results that would pose a significant danger to legitimate service providers and to the integrity of the DMCA. Imagine, for example, a video-hosting service that was otherwise eligible for the section 512(c) safe harbor, but that on one occasion commissioned a particular user to upload a video that, unbeknownst to the service, turned out to be infringing. A court might conclude that the service exerted a “substantial influence” over that instance of infringement and, if the service earned a direct financial benefit from it, there would be grounds for denying the safe harbor for a claim based on that video. But it would make no sense to thereby disqualify the service provider from DMCA protection *across the board*—even for countless other videos whose posting it did not control or from which it earned no benefit.

Likewise, consider a search engine eligible for protection under the section 512(d) safe harbor for linking to infringing material online. If one of the millions of links provided by the search engine pointed users to infringing material that had been authored by the search engine itself and that users were charged to view, a finding of control plus financial benefit might be warranted for that particular link.

But, again, there would be no plausible basis for categorically depriving the service of the safe harbor for the millions of unrelated links it delivers to material that it does not control or financially benefit from.

Outcomes like these have no support in the language of the DMCA or in the policies that animate it. To the contrary, sections 512(c)(1)(B) and 512(d)(2) expressly provide that a service provider loses the safe harbor only if it receives “a financial benefit directly attributable to *the* infringing activity, in a case in which the service provider has the right and ability to control *such* activity.” (Emphasis added). The use of the definite articles in these provisions underscores that even if a service provider controls and benefits from certain specific instances of infringing activity, it still can retain safe harbor protection for other activity.

Especially when combined with the threat of statutory damages, a contrary holding could transform a service provider’s isolated “foot-fault” into a massive damages award based on unrelated user-submitted content. That understanding of the panel’s decision would undermine the basic purpose of the DMCA and chill legitimate online service providers far-removed from the infringing conduct of the Fung defendants here. *Cf. Perfect10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007) (DMCA aims to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development,

and education in the digital age” by limiting online service providers’ “legal exposure for infringements that may occur in the course of their activities”).

Google assumes the panel did not intend this untenable result.² Instead, we believe that the passage quoted above was meant to be understood in connection with the particular facts of this case. In finding that the Fung defendants exerted “substantial influence” over the infringing conduct at issue, the panel (slip op. at 52) relied on the “overwhelming evidence that Fung engaged in culpable, inducing activity like that” in *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). As the panel observed, the record here is replete with examples of Fung engaging in culpable conduct that is directed at a sizable portion of the audience for his services. Slip op. at 30-32 (cataloguing Fung’s inducing conduct, including his “active encouragement of the uploading of torrent files concerning copyrighted content” and the “numerous messages” to isoHunt forums soliciting infringement). Moreover, there is evidence that Fung’s own unlawful intent encompassed the whole of his business model for these sites. *Id.* at 50-51.³

This analysis reveals that Fung exerted broad-based influence over the infringement that occurred using its services. The panel’s ruling thus is best read

² As the panel opinion recognizes, slip op. at 47 n.20, this issue was one of first impression that appears not to have been briefed by the parties or *amici*.

³ In addition, as described by Google in its original *amicus* brief, Fung does not qualify for the safe harbors for a variety of other independent reasons, which further demonstrate that a “site-wide” disqualification is appropriate in this case.

as holding that, in a case such as this—where the service provider engages in widespread inducement of infringement that reaches across its entire service and earns a financial benefit directly from that infringing activity—it may be disqualified from the safe harbor for any infringing activity using the service. But it does not follow that differently situated service providers, which might lose the safe harbor based on a narrower, less systemic finding of control-plus-financial-benefit, should suffer the same fate. Where a service provider substantially influences and directly benefits from only an isolated and limited set of infringements, it should lose the safe harbor only as to those infringements. There is no basis under the DMCA to extend the exclusion to other, unrelated instances of infringement or to cast the entire service out of the safe harbor even as to material that it did not have the “right and ability to control” or from which it earned no direct financial benefit.

CONCLUSION

For these reasons, Google urges the panel to clarify its opinion to confirm that the Fung defendants’ “service-wide” loss of the section 512(c) safe harbor results from the particularly egregious, service-wide nature of their conduct.⁴ By

⁴ In particular, the panel might consider amending the sentence on page 52 of the slip opinion to add the emphasized words: “We have no difficulty concluding that where the § 512(c)(1)(B) safe harbor requirements are not met **across the service**, the service provider loses protection with regard to any

so doing, the panel would eliminate any doubt that its ruling was not intended to announce a new categorical rule that applies regardless of the particular facts and circumstances of the case. This modest but important change to the original opinion will not alter the result in this case, but it will ensure that the decision will not misconstrued by future litigants and courts to the detriment of legitimate service providers and to the important goals advanced by the DMCA safe harbors.

Respectfully submitted,

/s David H. Kramer

David H. Kramer
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300

Brian M. Willen
WILSON SONSINI GOODRICH & ROSATI
1301 Avenue of the Americas
40th Floor
New York, NY 10019
(212) 999-5800

Counsel for Amicus Curiae

infringing activity using the service.” Alternatively, the sentence could be changed to read: “We have no difficulty concluding that because Fung did not meet the § 512(c)(1)(B) safe harbor requirements across his service, he loses protection with regard to any infringing activity using the service.”

Exhibit 1

CHICAGO LOS ANGELES NEW YORK WASHINGTON, DC

JENNER & BLOCK LLP

March 22, 2013

Paul M. Smith
Tel 202 639-6060
Fax 202 639-6066
psmith@jenner.com

VIA HAND DELIVERY

Hon. Louis L. Stanton
United States District Court
Southern District of New York
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007

Re: ***Viacom Int'l Inc., et al. v. YouTube Inc., et al., No. 07 cv 2103***

Dear Judge Stanton:

I write on behalf of Plaintiffs in the above-referenced action regarding two recent decisions by the United States Court of Appeals for the Ninth Circuit, *Columbia Pictures Indus. v. Fung*, ___ F.3d ___ (March 21, 2013) (“*Fung*”), and *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, ___ F.3d ___ (March 14, 2013) (“*Shelter Capital*”), which are enclosed. These decisions apply and expand upon the Second Circuit’s decision in this case and reject many of the principal arguments the Defendants are currently advancing before this Court. The Ninth Circuit’s rejection of Defendants’ positions is all the more telling because Google participated in both cases as amicus curiae and directly advocated these rejected positions.¹

Read together, *Fung* and *Shelter Capital*, which were argued on the same day and decided by the same panel, make clear the following:

(1) Where a plaintiff develops a factual record of a defendant’s wrongful intent to welcome and profit from massive copyright infringement, the defendant is not entitled to the DMCA safe harbor. The plaintiffs in *Fung* developed such a record, as has Viacom in this case. In *Fung*, the Court affirmed summary judgment on liability and on the DMCA safe harbor in favor of the plaintiffs. In contrast to the summary judgment record in *Fung* and *Viacom*, the factual record in *Shelter Capital* was much more limited, with the plaintiff, UMG, resting primarily on the argument that a service-provider’s generalized suspicion of infringement is enough to cost it the safe harbor – an argument Viacom has never advanced.

¹ See *Brief of Google, Inc. as Amicus Curiae*, Ninth Circuit Case No. 10-55946, Dkt. No. 31-3 (Feb. 8, 2011); *Brief of Amici Curiae Ebay Inc., et al.*, Ninth Circuit Case No. 09-56777, 2010 WL 3706523 (July 26, 2010).

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(2) In both decisions, the Ninth Circuit roundly rejected amicus Google's effort to import a specific knowledge requirement into the right and ability to control prong of the DMCA, as Defendants Google and YouTube seek to do here. The Ninth Circuit expressly rejected that argument in *Fung*, and excised all references to it in its superseding opinion in *Shelter Capital*. Moreover, in *Fung* the Ninth Circuit accepted Viacom's position here and made clear that where DMCA eligibility is unavailable due to the right and ability to control prong of the safe harbor, the DMCA defense is broadly lost as to all clips in suit.

(3) Again consistent with Viacom's position in this case, the Ninth Circuit in *Fung* agreed with the Second Circuit that the "something more" for purposes of the right and ability to control can be established by a showing of *Grokster* liability, which in turn centers on intent, the paradigm issue not amenable to summary judgment. (Indeed, as noted above, in *Fung* the District Court and Court of Appeals found the record of intent so compelling that summary judgment was entered for the plaintiffs.) Under the Ninth Circuit's decision, congruent with Viacom's reading of the Second Circuit's decision, summary judgment for Defendants is inappropriate under the right and ability to control, unless this Court is prepared to find as a matter of law that defendants lacked *Grokster* intent or the type of control at issue in *Cybernet*. On the vast record before this Court, any such ruling would be clearly erroneous.

(4) The Ninth Circuit in *Shelter Capital* also embraced the same position Viacom is advocating here on the issue of willful blindness, agreeing that if a plaintiff makes a showing that defendants buried their heads in the sand to avoid obtaining specific knowledge of offending clips, then the DMCA is lost on that basis also. (Willful blindness was not at issue in the *Fung* case.) In *Shelter Capital*, UMG offered "no evidence" of willful blindness. The contrast with the substantial summary judgment record before this Court could not be starker.

Columbia Pictures Indus. v. Fung (March 21, 2013)

In *Fung*, the Ninth Circuit affirmed summary judgment for the plaintiffs, holding *Fung* liable under *Grokster* and ineligible for the DMCA safe harbor. Following the Second Circuit's decision in *Viacom*, the Ninth Circuit held that the right and ability to control can be established by a showing of *Grokster* intent. *Fung* slip op. at 51; *Shelter Capital* slip op. at 48-50. In light of that holding, the Ninth Circuit's discussion of *Grokster* inducement and the DMCA compel denial of Defendants Google and YouTube's renewed motion for summary judgment. In this case, the issue of *Grokster* intent under the right and ability to control prong of the DMCA is necessarily for the jury to decide as trier of fact.

In affirming *Fung*'s *Grokster* liability, the court rejected *Fung*'s argument that inducement requires *both* an improper object *and* clear expression or other affirmative steps taken to foster infringement, holding that the latter is not a separate requirement but rather an explanation of how an improper object is proven. *Fung* slip op. at 26. The court reaffirmed that under *Grokster*, the "clear expression" manifesting an improper purpose may consist of "explicit internal communication to that effect," and need not include any outward messages to users. *Id.* at 28. Accordingly, the court rejected *Fung*'s and amicus Google's argument that under *Grokster* each act of infringement must be caused by an inducing message to users. *Id.* at 32; *see*

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also Defs. SJ Reply Br. at 29-34 (making same causation argument rejected by the Ninth Circuit). Instead, the court adopted the plaintiffs' interpretation of causation (consistent with Viacom's), holding that "if one provides a service that could be used to infringe copyrights, with the manifested intent that the service actually be used in that manner, that person is liable for the infringement that occurs through the use of the service." *Id.* at 32-33. The court also made clear that it is highly relevant as proof of *Grokster* intent if the defendant failed to use available filtering tools or other mechanisms to prevent infringement, and if it is advertising-supported and thus profits from the traffic motivated by the availability of infringing materials. *Id.* at 29-32.

Turning to the right and ability to control provision of the DMCA, the Ninth Circuit held that Fung's *Grokster* intent in and of itself sufficiently demonstrated his right and ability to control infringing activity. In so doing, the Ninth Circuit expressly rejected the argument that the right and ability to control applies only to specific instances of infringement, reasoning that the right and ability to control "rest[s] on the overall relationship between the defendant and the infringers." *Fung* slip op. at 52. Thus, the court had "no difficulty concluding that where the § 512(c)(1)(B) safe harbor requirements are not met, the service provider loses protection with regard to any infringing activity using the service." *Id.* The Ninth Circuit also held that Fung received a direct financial benefit by "selling advertising space on his websites," which "depended on the number of users who viewed and then clicked on the advertisements." *Id.* at 50. The "vast amount of infringing material on [Fung's] websites . . . support[ed] an inference that Fung's revenue stream is predicated on the broad availability of infringing materials for his users, thereby attracting advertisers." *Id.*

Viacom has shown through a trove of internal emails that YouTube's co-founders had the improper object of welcoming and profiting from massive infringement. *E.g.*, Viacom SJ Opp. Br. at 39-41; *see also Viacom Int'l, Inc. v. YouTube, Inc.* 718 F. Supp. 2d 514, 518 (S.D.N.Y. 2010), *aff'd in part, rev'd in part*, 676 F.3d 19 (2d Cir. 2012) ("a jury could find that the defendants not only were generally aware of, but welcomed, copyright-infringing material being placed on their website."). Further underscoring YouTube's wrongful intent is its refusal to deploy available filtering technologies to protect Viacom's copyrighted content, while offering those technologies to its licensing partners. Viacom SJ Opp. Br. at 44-45. And like Fung, YouTube generated revenue almost exclusively by advertising space on its website, earning more revenue through the high volume use of the site, which was predominantly infringing by YouTube's own estimates. *Id.* at 48-49; *see also Viacom*, 718 F. Supp. 2d at 518 ("Such [copyright-infringing] material was attractive to users, whose increased usage enhanced defendants' income from advertisements displayed on certain pages of the website, with no discrimination between infringing and non-infringing content."). In short, all of the elements of a *Grokster* violation are established through record evidence in this case, which at a minimum raises genuine disputes of material fact precluding summary judgment.

With respect to the knowledge prong of the DMCA, the Ninth Circuit held that Fung had "'red flag' knowledge of a broad range of infringing activity," given his *Grokster* inducement. *Fung* slip op. at 46. The court explained that "[t]he material in question," which included many popular Paramount movies also at issue in this litigation, "was sufficiently current and well-known that it would have been objectively obvious to a reasonable person that the material

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solicited and assisted was both copyrighted and not licensed to random members of the public, and that the induced use was therefore infringing.” *Id.*² As discussed further below, read together with *Shelter Capital*, *Fung* supports Viacom’s argument that YouTube willfully blinded itself to the rampant infringement of Viacom’s works although willful blindness was not itself at issue in *Fung*. The clips-in-suit include countless red flags given that Viacom’s television shows and movies were “sufficiently current and well-known that it would have been objectively obvious to a reasonable person that they were both copyrighted and not licensed to random members of the public, and [were] therefore infringing.” *Fung* slip op. at 46. Viacom has shown that YouTube went to great lengths to avoid obtaining knowledge of specific infringements, while knowing (or at least having a high degree of suspicion) that Viacom’s works were being infringed on YouTube on a massive scale. Viacom SJ Opp. Br. at 2, 14-28; *see also* Viacom RSUF ¶¶ 109-111 (co-founder Jawed Karim’s memo to YouTube’s board of directors informing them that “blatantly illegal” clips of the “well known” Viacom “shows . . . South Park, MTV Cribs, Daily Show, Reno 911, [and] Dave Chappelle” can be found on YouTube).

UMG Recordings, Inc. v. Shelter Capital Partners LLC (March 14, 2013)

As the Court will recall, the Ninth Circuit’s original December 20, 2011 decision affirmed the grant of summary judgment for Veoh on the DMCA safe harbor. The panel subsequently withdrew its opinion and granted UMG’s petition for panel rehearing. On March 14, 2013, the Ninth Circuit issued its superseding opinion, again affirming summary judgment for Veoh on the safe harbor, but with important revisions, (1) striking all references to the court’s holding that the right and ability to control requires knowledge of specific infringements; (2) adopting the Second Circuit’s right and ability to control standard, agreeing that the “something more” can be shown through *Grokster* intent or the type of control present in *Cybernet*; and (3) affirming that a service provider cannot “bury its head in the sand to avoid obtaining . . . specific knowledge,” including awareness of red flags of infringement. Defendants’ March 18, 2013 letter to the Court regarding *Shelter Capital* completely ignores the first of these revisions and distorts the others. Defendants also misconstrue the far more limited factual record in *Shelter Capital*, which led the Ninth Circuit to conclude that UMG had failed to raise a genuine dispute of material fact as to the website Veoh’s entitlement to the DMCA safe harbor.

In its superseding opinion, as in its original opinion, the Ninth Circuit repeatedly noted the sparse factual record as to Veoh’s right and ability to control and knowledge. Given the very different summary judgment record in *Shelter Capital*, the Ninth Circuit’s ultimate conclusion that UMG failed to raise a genuine dispute of material fact as to Veoh’s entitlement to the safe harbor has little if any bearing here.

In its original decision, the Ninth Circuit had held that “a service provider must be aware of specific infringing material to have the ability to control that infringing activity within the

² Noting that it was “not clear” from the statutory text or case law whether actual or red flag knowledge of specific infringing activity negates the safe harbor only with respect to that activity, or more broadly, the Ninth Circuit opted not to resolve that question, because it found *Fung* ineligible for the safe harbor as to all infringing activity under the right and ability to control, which does not turn on specific infringements. *Fung* slip op. at 47 n.20.

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meaning of § 512(c)(1)(B).” *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1042 (9th Cir. 2011); *see also id.* at 1041-42 (citing this Court’s original summary judgment decision). Google and other amici had urged the Ninth Circuit to take that position. *Brief of Amici Curiae Ebay Inc., et al.*, No. 09-56777, 2010 WL 3706523 at *19-20 (July 26, 2010). In its superseding decision issued last week, the Ninth Circuit *deleted all prior references tying the right and ability to control to knowledge of specific infringements*. That is notable because Defendants Google and YouTube have relied on those references in arguing, as they continue to do in their renewed summary judgment motion, that the right and ability to control is clip specific, requiring knowledge of specific infringements.³ That position has now been squarely rejected by the Second Circuit, *Viacom*, 676 F.3d at 36 (disagreeing with original *Shelter Capital* decision), and by the Ninth Circuit in *Fung* (see above).

With respect to the right and ability to control, the Ninth Circuit also adopted the Second Circuit’s interpretation of the types of control that can constitute “something more,” holding that this standard can be met by “high levels of control over activities of users, as in *Cybernet*,” or “purposeful conduct, as in *Grokster*.” *Shelter Capital* slip op. at 48-49. Applying that standard, the Ninth Circuit concluded that UMG had failed to raise a triable issue of fact because it had not proffered *any evidence* showing that “Veoh’s activities involved ‘something more than the ability to remove or block access to materials posted on [its] website.’” *Id.* at 50 (quoting *Viacom*, 676 F.3d at 38). The summary judgment record established only that “(a) the allegedly infringing *material* resided on Veoh’s system; (b) Veoh had the ability to remove such material; (c) Veoh could have implemented, and did implement, filtering systems; and (d) Veoh could have searched for potentially infringing content.” *Id.* at 49 (quotation marks omitted; italics in original). The Ninth Circuit held that “[s]uch circumstances are not equivalent to the activities found to constitute substantial influence in *Cybernet* and *Grokster*.” *Id.* at 49-50. In contrast to the record in *Shelter Capital* and more akin to the record in *Fung*, *Viacom* has proffered extensive evidence under both *Grokster* and *Cybernet*, which at a minimum raises multiple triable issues of fact. *Viacom* SJ Opp. Br. at 39-46. Only by grossly distorting the record in this case and arguing that multiple factual disputes should be resolved in their favor could Defendants liken their conduct to Veoh’s, as they strain to do in their March 18, 2013 letter.

As to the knowledge prong of the safe harbor, the Ninth Circuit agreed with the Second Circuit that the difference between actual and red flag knowledge is between a subjective and an objective standard, but concluded that “UMG has not created a genuine issue of material fact as to whether Veoh had either kind of knowledge here.” *Shelter Capital* slip op. at 40. UMG’s “primary theory” was that “Veoh’s general knowledge that it hosted copyrightable material and that its services could be used for infringement,” disqualified it from the DMCA. *Id.* at 33-34, 37; *see also Brief of Amici Curiae Ebay Inc., et al.*, 2010 WL 3706523 at *16-18 (construing UMG’s argument as “equating a generalized suspicion of infringement with actual knowledge or red flag awareness”). *Viacom* has never relied on such “general knowledge,” but on extensive evidence, including incriminating internal e-mails unlike anything discussed by the Ninth

³ *See, e.g.,* Defs. FRAP 28(j) Ltr. to the Second Circuit (Case No. 10-3270, ECF No. 505) (stating that *Shelter Capital* “adopt[ed] Judge Stanton’s holding that a ‘service provider must be aware of specific infringing material to have the ability to control that infringing activity.’”).

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Circuit, showing that Defendants knew of—and, indeed, quantified—rampant infringement on YouTube, including infringement of specific Viacom works. Viacom SJ Opp. Br. at 16-21.

In concluding that UMG had failed to proffer evidence sufficient to warrant a trial, the Ninth Circuit held, citing *Viacom*, that “[o]f course, a service provider cannot willfully bury its head in the sand to avoid obtaining . . . specific knowledge,” but found “*no evidence* that Veoh acted in such a manner.” *Shelter Capital* slip op. at 34 (emphasis added). As to this issue of willful blindness, there was no evidence that Veoh, like YouTube, disabled community flagging for copyright infringement to avoid notice, reviewed and approved thousands of clips-in-suit flagged for other terms of use violations while ignoring their blatantly infringing character, rejected proposed tools to identify and root out infringement, initially declined to provide Audible Magic filtering to protect movie studio content because copyright infringement was a “major lure” for users, and eventually used Audible Magic filtering only to protect the content of license partners while refusing to provide it to the plaintiff copyright holders. See Viacom SJ Opp. Br. at 2, 14-28. Although Defendants labor to spin the Ninth Circuit’s brief discussion of willful blindness in their favor, it clearly supports Viacom’s position. Defs. March 18, 2013 Ltr. at 1-2.

The other aspects of the Ninth Circuit’s original *Shelter Capital* decision remain undisturbed, including its holding that “Veoh has satisfied the threshold requirement that the infringement be ‘by reason of storage at the direction of a user.’” *Shelter Capital* slip op. at 28. Notably, the syndication of content to third parties was not at issue in *Shelter Capital*, and the Ninth Circuit made no reference to that portion of the Second Circuit’s *Viacom* decision.

Respectfully submitted,

/s/ Paul M. Smith

Paul M. Smith

Enclosures

cc: All counsel of record (via e-mail)

9th Circuit Case Number(s): 10-55946

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 15, 2013. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Mr. Jared Robinson Smith
ROTHKEN LAW FIRM
3 Hamilton Landing
Suite 280
Novato, CA 94949

s/ Deborah Grubbs
Deborah Grubbs